No. 10-1041

IN THE

Supreme Court of the United States

LOUISE PARTH, individually,
and on behalf of others similarly situated,

Petitioner,

v.

POMONA VALLEY HOSPITAL MEDICAL CENTER,
a California corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should grant review of the opinion of the United States Court of Appeals for the Ninth Circuit affirming the district court's decision that it is lawful to pay employees different hourly wage rates when they are assigned different shifts, where the court of appeals' decision comports with the long-standing position of the U.S. Department of Labor, does not conflict with any decision of the United States Supreme Court, a state court of last resort, or of a United States Court of Appeals, and does not implicate an important federal question that must be settled by the Court.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Pomona Valley Hospital Medical Center has no parent corporation and no publicly owned corporation owns 10% or more of Pomona Valley Hospital Medical Center's stock.

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STATEMENT OF THE CASE

In the late 1980s, Pomona Valley Hospital Medical Center's ("PVHMC") Registered Nurses ("RNs") requested a 12-hour shift schedule in order to have more days away from the hospital. (ER Tab 60 at 135, Fact 29.)[1] PVHMC agreed to accommodate their scheduling desires on the condition that the change from 8-hour to 12-hour shifts would be economically feasible. Under the agreed-upon pay plan ("Pay Plan"), RNs who voluntarily transferred to a 12-hour job classification worked 12-hour shifts, received daily overtime at time-and-a-half pay for hours over eight, and double time for hours over 12. However, those who opted to transfer were paid a lower base hourly wage rate than RNs assigned to 8-hour job classifications such that the resulting pay was approximately equivalent for full-time work.

RNs assigned to 12-hour job classifications achieve full-time status by working three 12-hour shifts per week while RNs assigned to 8-hour job classifications must work five 8-hour shifts. (ER Tab 60 at 133, 134, Facts 19, 24 & 25.) RNs in the 12-hour job classifications therefore generally have four days off per week while those in 8-hour job classifications have just two days off. Thus, the 12-hour shift schedule provides RNs with many lifestyle benefits, including two extra days off per week and less time and expense commuting.

In October 1993, Petitioner Louise Parth ("Parth") voluntarily executed a "12-Hour Shift Agreement" and

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1. PVHMC cites to the Excerpts of Record ("ER") filed in the Ninth Circuit Court of Appeals in this case.

transferred from an 8-hour job classification to a 12-hour job classification. (ER Tab 60 at 132, 136 & 137, Facts 14, 34 & 35.) This transfer gave her flexibility to care for her mother, pursue second jobs at other hospitals, and pick up additional shifts at PVHMC beyond her minimum requirement. (ER Tab 60 at 136, Fact 33.) As part of the agreement, her hourly wage was changed from the 8-hour job classification rate of $22.83 to the 12-hour job classification rate of $19.57, and she received overtime pay for the hours over eight she worked each day and double time for hours over 12. (ER Tab 60 at 136-137, Fact 34.)

In 2004, PVHMC entered into its first Collective Bargaining Agreement ("CBA") with Service Employees International Union ("SEIU") Local 121 RN ("Local 121"). (ER Tab 60 at 139, Fact 46.) The CBA covered the RNs and used the same lower base hourly wage rates for RNs assigned to 12-hour job classifications. (ER Tab 60 at 141, Facts 51-52.) Parth personally participated in the CBA negotiations and voted in favor of the CBA which adopted the Pay Plan. The CBA was also approved by Local 121 members in good standing. (ER Tab 60 at 139-140, Fact 47.)

On July 17, 2006, more than 15 years after the Pay Plan was created and 12 years after Parth voluntarily transferred to a 12-hour job classification, she filed this suit against PVHMC. Invoking jurisdiction pursuant to 28 U.S.C. § 1331, Parth claimed that the agreement which created the 12-hour job classifications is an "artifice and subterfuge" that violates the overtime provisions of the Fair Labor Standards Act ("FLSA"). The district court disagreed, and on December 5, 2007 granted summary judgment for PVHMC, ruling as a matter of law that the

Pay Plan complies with the FLSA and its underlying purpose. Judgment was entered on December 31, 2007, and Parth appealed.

The Ninth Circuit Court of Appeals affirmed the district court's ruling and filed an opinion on October 22, 2009. *Parth v. Pomona Valley Hospital Medical Center*, 584 F.3d 794 (9th Cir. 2009). Parth filed a petition for rehearing and petition for rehearing *en banc* on November 9, 2009. Thereafter, in response to an invitation from the court of appeals, the Secretary of Labor (the "Secretary"), through the Office of the Solicitor, filed an amicus curiae brief agreeing that PVHMC's Pay Plan is lawful.[2] On November 18, 2010, the court of appeals withdrew the opinion dated October 22, 2009, filed a revised opinion that is not reported, and denied Parth's petition for rehearing and petition for rehearing *en banc*. On December 13, 2010, an amended opinion was filed, reported at 630 F.3d 794, and the court of appeals filed its Mandate, stating: "The judgment of this Court, entered November 18, 2010, takes effect this date."

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2. The Secretary confirmed that the FLSA does not prohibit reductions in hourly wages provided that, as here, the reduction is not designed to circumvent the FLSA's overtime requirements (such as when an *artificial* rate is used to calculate overtime), and the rate is *bona fide*. The Secretary explained that, contrary to Parth's challenge, PVHMC does not *avoid* the payment of overtime to its RNs assigned to 12-hour job classifications. The Secretary correctly emphasized that under the lawful 8/80 pay plan, daily overtime is in fact paid to RNs when due under the FLSA, and that such overtime is properly calculated based on the actual hourly rate paid. As the administrative body charged with enforcing the FLSA, the Department of Labor's ("DOL") analysis is entitled to deference. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

SUMMARY OF ARGUMENT

No compelling reason exists for the Court to grant review of the Petition filed by Parth. As the Secretary accurately reported to the court of appeals and independently verified, there is no legal precedent that conflicts with the court of appeals' decision in this case.[3] Rather, although this was a case of first impression in the Ninth Circuit, the court of appeals' reasoning was entirely consistent with the analysis employed by other courts since the enactment of the FLSA, including decisions of the U.S. Supreme Court, other federal courts around the country, and the California Supreme Court that have evaluated rate reductions. As the court of appeals correctly held, absent the presence of an artifice or subterfuge, cost-neutral rate reductions are perfectly legal under *Walling v. A.H. Belo*, 316 U.S. 624 (1942) ("*Belo*"), and its progeny. *Belo* 316 U.S. at 630 ("[N]othing in the [FLSA] bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum rate required by the FLSA.") *see also Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 (1945) ("*Youngerman-Reynolds*").

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3. The Secretary noted that the court of appeals' decision comports with the DOL's "long-standing" position set forth in a series of opinions spanning from 1988 to 1999, and was entirely "consistent with the pertinent case law." (Department of Labor amicus curiae brief ("DOL Brief"), pp. 9-12.) The Secretary further noted that the decision does not conflict with any "decision of the Supreme Court" and concluded that "neither the panel rehearing nor hearing *en banc* is warranted." (DOL Brief, pp. 17-18.)

In her Petition, Parth seeks to revisit the same empty arguments asserted in the district court and court of appeals, to no avail. Indeed, such arguments are largely founded on a misreading of cases such as *Youngerman-Reynolds*, and *Wethington v. City of Montgomery*, 935 F.2d 222 (11th Cir. 1991). These cases, however, clearly support PVHMC's actions and the court of appeals' decision, holding that: (1) employers who are subject to the FLSA must calculate the regular rate based on actual hours worked (as PVHMC has always done), and (2) nothing in the FLSA prohibits cost-neutral rate reductions. *See Wethington*, 935 F. 2d at 227-229; *Youngerman-Reynolds*, 325 U.S. at 424 ("As long as the minimum hourly rates established by Section 6 [of the FLSA] are respected, the employer and employee are free to establish this regular rate at any point and in any manner they see fit."). Moreover, there is no authority that conflicts with the court of appeals' decision affirming summary judgment. Indeed, the court of appeals fully analyzed every key case discussed in Parth's Petition, and followed U.S. Supreme Court precedent when it determined:

> "Though our Circuit has never been asked to determine whether an employer subject to the FLSA may alter the 'regular rate' of pay in order to provide employees a schedule they desire, we conclude that such an arrangement does not contravene the FLSA's purpose."

Parth, 630 F.3d at 799. Try as she might to obscure this fundamental point, the fact remains that the Petition cites no authority from anywhere in the country that conflicts with the *rationale* employed by the district court and court of appeals. That the court of appeals' careful analysis gave

rise to a different result than that desired by Parth is not adequate grounds to grant the Petition. Simply stated, no conflict exists.

Beyond that, Parth's Petition is founded entirely on the alleged inequities of paying different hourly rates of pay to employees who perform the same duties, but work in different job classifications and different shifts. This does not raise a fundamental federal question that requires review by this Court. The district court, court of appeals, and Secretary agreed that the FLSA permits the payment of different rates to employees performing the *same* work on shifts of different lengths. Indeed, as she must, Parth concedes the legality of the widespread and long-standing industry practice whereby RNs in 12-hour job classifications and other employees are paid different rates for the same duties depending on whether the work is performed on day, evening, night, weekend, or holiday shifts. Moreover, it is indisputable that the lower rate paid to RNs is bona fide and that the RNs were in fact paid overtime based upon the lawful 8/80 pay plan.

Finally, the Petition seeks to hinder the ability of employers and employees to reach wage agreements that respect the FLSA's overtime protections. Contrary to Parth's assertions, the FLSA allows for a variety of wage agreements, including PVHMC's lawful 8/80 pay plan. The right to reduce wage rates in response to the economic realities of the workplace, as long as the minimum wage is respected, has repeatedly and uniformly been recognized by courts across the country since the passage of the FLSA. That right must continue to be preserved.[4]

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4. The California Supreme Court has reiterated this very premise under California law. "[I]t is settled that an employer may unilaterally alter the terms of an employment agreement...."

REASONS FOR DENYING THE PETITION

A. There Is No Conflict In The Law

In an attempt to create a conflict in the law where none exists, Parth erroneously hand-picks isolated lines from *Youngerman-Reynolds* and *Wethington* that have no application here. Instead, the case law uniformly affirms that PVHMC's Pay Plan complies with the FLSA, and the Ninth Circuit's opinion in this case is consistent with that case law.[5]

1. Consistent With *Youngerman-Reynolds*, PVHMC's Pay Plan Respects The Minimum Hourly Rate Established By Section 6 Of The FLSA

The FLSA does not infringe upon the right of employers to establish wage rates "at any point and in any

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Schachter v. Citigroup, Inc., 47 Cal. 4th 610, 619 (2009), citing *DiGiacinto v. Ameriko-Omserv Corp.*, 59 Cal. App. 4th 629, 637 (1997), and 3 Witkin, Summary of California Law (10th ed.) Agency and Employment, § 236 (unilateral reduction in wage). An "employee who [stays] after the employer has given notice of changed terms or conditions of employment has accepted the changed terms." *Id.*, quoting *DiGiacinto*, 59 Cal. App. 4th at 637. Thus, "[i]t cannot be questioned that employers and employees are free to prospectively and bilaterally alter the terms of employment. . . . 'Straight-time wages (above the minimum wage) are a matter of private contact. . . ." *Id.* (emphasis in original).

5. The court of appeals correctly distinguished the *Walling v. Helmerich & Payne*, 323 U.S. 37 (1944), line of cases cited by Parth in which courts have struck down as artificial those "split-day" plans and other arrangements whereby employees' rates go down as their hours go up so that they never earn an overtime premium no matter how many hours they work. *Parth*, 630 F.3d at 802.

manner they see fit." *Youngerman-Reynolds*, 325 U.S. at 424. Indeed, the FLSA permits an employer to reduce rates in connection with employee schedule changes provided that the reduction is not designed to circumvent the Act's overtime requirements. To comply with the Act's overtime requirements, non-exempt employees must simply be paid time and one-half their regular rate for each overtime hour worked (which PVHMC has always done).

The "regular rate" is clearly defined in the Code of Federal Regulations: "The regular rate of pay for an employee is determined by dividing his total remuneration for employment (less statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." 29 C.F.R. § 778.109. "[T]he regular rate cannot be an artificial rate designated by the employer, but instead is the hourly rate actually paid to the employee." *Youngerman-Reynolds*, 325 U.S. at 424 ("[R]egular rate refers to the hourly rate actually paid the employee for the normal, non-overtime workweek."). Thus, *Youngerman-Reynolds* invalidated pay plans that attempted to avoid or underpay overtime due by setting artificial regular rates that were not based on the actual amounts paid to employees.

In contrast, PVHMC's Pay Plan does not circumvent the purpose of the FLSA because it properly pays daily overtime to its RNs assigned to 12-hour job classifications.[6] Most significantly, these daily overtime

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6. Parth does not challenge the fact that she was paid overtime at a rate of time-and-a-half for all hours worked over eight in a day and/or 80 in a 14-day work period (and double-time for hours over 12 in a day).

payments are calculated based on a regular rate that reflects the actual hourly rate paid. This is all the FLSA requires and therefore PVHMC's actions are in accord with *Youngerman-Reynolds*.

2. Consistent With *Wethington*, PVHMC Paid The Regular Rate Of Pay For Hours Actually Worked

Parth continues to mischaracterize *Wethington* – advancing the same failed arguments as the plaintiffs in that case and *York v. Wichita Falls*, 48 F.3d 919 (5th Cir. 1995), a lesser cited case with a similar fact pattern and holding.[7] (*See* Petition at 14-16.) Unlike the instant case, both *Wethington* and *York* were complicated by the fact that they involved artificial/fictitious calculations in the initial, pre-FLSA engineering of the reduced rate. Each court noted the calculations would have been invalid had they occurred while the employers were subject to the FLSA, because the regular rate is that which is *actually* paid for hours *actually* worked. *Wethington*, 935 F.2d at 226-228; *York*, 48 F.3d at 922. But both those pay plans were saved because their on-going administration under the FLSA involved the payment of overtime on the reduced rate, properly based on the *actual* hours worked and the *actual* regular rate earned by the employees. As the court of appeals correctly concluded, these cases simply do not stand for the proposition that rate reductions may only occur prior to the FLSA, as Parth strains to read them.[8] On the contrary, in addition to standing for

7. These cases are also inapposite because they hinge upon the anti-retaliation provision only applicable to public entities. *See* 29 U.S.C. § 215.

8. Significantly, no court has ever ordered a roll-back to the higher, pre-FLSA wage rates after the effective date of the Act.

the proposition that the regular rate must be calculated from *actual* hours worked (as PVHMC has always done), *Wethington* also holds that "[n]othing in the [FLSA] prohibits [cost-neutral rate reductions]." *Wethington*, 935 F.2d at 228. In so holding, the court relied upon this 1961 language of the Wage and Hour Administration:

> "There is nothing in the Act which prohibits the changing of an employee's hourly wage rate by agreement with the employee. The rate so adopted, however, must be a bona fide rate (not less than the minimum wage applicable under the Act) on which the employee's straight-time and overtime compensation is computed and paid for the hours actually worked."

Id. at 229. Indeed, careful reading confirms that *Wethington* is on all fours with this case, supports PVHMC's lawful rate reduction, and negates Parth's conflict contention.

3. There Is No Split Of Authority Regarding The Lawfulness Of Cost Neutral Rate Reductions

Parth insinuates a conflict exists by seizing upon a single line from the court of appeals' decision which states, "'[c]ourts around the country have dealt with similar matters, with conflicting results.'" (Petition at 4, quoting *Parth*, 630 F.3d at 800-801.) This statement must not be read out of context. It is true that different *results* have been reached by those few district courts that have considered the propriety of cost-neutral rate reductions. Nonetheless, the relevant case law across the country (all of which was addressed by the court of appeals) is

consistent and easily reconciled due to the presence of different fact patterns. The *legal analysis* employed by the court of appeals is entirely consistent with that of other courts that have considered similar issues.[9]

Although ignored by Parth, the most analogous case is *Conner v. Celanese Ltd.*, 428 F. Supp. 628 (S.D. Tex. 2006), in which the court applied *Belo* and *Youngerman-Reynolds* to uphold a post-FLSA cost neutral rate reduction implemented as part of a voluntary and optional 12-hour shift program. 428 F. Supp. at 637 ("Defendant did not violate the FLSA by reducing the 12-hour shift wage such that the annualized wages for employees would remain the same for 12-hour shift and 8-hour shift employees."). Like here, the employer in *Conner* paid daily overtime to those employees assigned to 12-hour shifts, and continued to maintain a workforce of 8-hour and 12-hour shift employees performing the same duties but subject to two different rate scales. The court found no evidence of an artifice or subterfuge. *Id.*

In contrast, as also cited by the court of appeals, the district court in *Rhodes v. Bedford County*, 734 F.

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9. The propriety of cost-neutral rate reductions has also been long-recognized by the California Supreme Court. In *Marvin v. Hodgson*, 33 Cal. 2d 439 (1949), the employer testified that the U.S. Department of Labor audited him for compliance and *actually gave him the idea* to lower his basic rate for employees working 12-hour shifts: "They told me I would have to change;...that I would have to pay time and a half for overtime, *even if it meant lowering my basic rate.* That is where I got the idea in the first place to stay in business." 33 Cal. 2d at 441, 445 (cost-neutral rate reduction "violated no specific provision of the [FLSA] and is fairly within the 'operation of the [A]ct.'") (emphasis in original).

Supp. 289 (E.D. Tenn. 1990), applied similar *reasoning* but reached the opposite result. *Rhodes* involved the conversion of a salary that the employer acknowledged violated the minimum wage and overtime law into an hourly rate which equaled the former unlawful salary. *Id.* at 291-92. Because the employer admitted that it did not follow the regulations governing the calculation of the regular rate from a salary, its maneuver was deemed to be an "artificial" attempt to avoid the requirements of the FLSA and the plan was struck down. *Id.* at 292 ("Defendant does not dispute that during the period immediately before the changeover...the payments to the plaintiffs violated § 7. I am of the opinion that the changeover also violated § 7.").

Parth presented no evidence of artificiality, and there is no dispute that PVHMC always complied with the applicable regulations in its calculation of the regular rate and payment of overtime. Accordingly, PVHMC's pay plan is proper under *Belo*. Try as she might to obscure this fundamental point, the Petition cites no authority that conflicts with the *rationale* employed by the district court and court of appeals. In fact, as the DOL's amicus brief made clear, "the panel's decision does not conflict with a decision of the Supreme Court or a decision of [a court of appeals]." (DOL Brief, pp. 17-18.)

B. The Petition Does Not Implicate An Important Federal Question

PVHMC's Pay Plan does not "threaten the survival" of the FLSA, is not of "national interest," and does not present the "most fundamental challenge to the FLSA and its underlying policies in 65 years" as Parth

suggests. (*See* Petition at 6, 21.) Rather, the Pay Plan is fundamentally fair, fully consistent with the FLSA, and meets the three-prong test used by the DOL for more than 20 years to determine when reduced rates are "bona fide," as described in Section B.2. *infra*. Not only is the Pay Plan commonly utilized in the hospital industry, it was requested by the employees, voluntarily agreed to by Parth in 1993, and reaffirmed by the RNs' union in 2004. The courts have routinely concluded that employers may reduce hourly rates of pay so long as the reduced rates are bona fide and the minimum wage is respected. There is simply no need for this Court to address Parth's Petition.

1. The FLSA Permits Payment Of Different Rates To Employees Performing The Same Work On Different Shifts

In the Petition, Parth contends that the court of appeals erred in failing to strike the Pay Plan under 29 C.F.R. § 778.316, which prohibits employers from setting one hourly rate for the first 40 hours of work and a lower hourly rate for statutory overtime hours. (Petition at 12-13.) As the court of appeals correctly noted, Section 778.316 does not apply to a case like this in which a single base hourly rate is admittedly paid to RNs assigned to a 12-hour job classification for all hours of their regularly scheduled 12-hour shifts.[10] *Parth*, 630 F.3d at 804-805. Parth complains about a hypothetical situation that does not exist. Contrary to her intimations, PVHMC's RNs are not free to switch back and forth between 12-hour and 8-hour job classifications and, therefore, switch hourly

10. This is so even if, for any reason, the RN only works eight hours – or less – of a 12-hour shift.

rates at will. (*See* Petition at 8-9.) Rather, the choice between 8-hour and 12-hour shifts is made at their time of hire. A transfer from one job to the other requires a formal personnel action and is subject to management approval. (ER Tab 60 at 143, Fact 59; ER Tab 71 at 410, Fact 59.)

Moreover, as discussed by the court of appeals, no authority prohibits the payment of different rates to employees performing the same job duties on different shifts. *Parth*, 630 F.3d at 805. Consistent with the court's discussion, Parth failed to present any authority in support of her position in her Petition or before the court of appeals. Instead, several cases consistently allow the practice Parth argues is illegal. *See Allen v. Bd. of Education for Bibb County*, 495 F. 3d 1306, 1312-1313 (11th Cir. 2007) (neither the FLSA nor the CFR "mandate that different types of work be performed if different rates are paid"); *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 595-97 (2nd Cir. 2007) (approving a three-tiered compensation system for employees depending on the shift worked); *Conner v. Celanese*, 428 F. Supp. 2d at 636-37 (different rates for different shifts are permissible).[11] And, employers and employees are generally free to set the pay rates if the minimum wages and overtime payments are paid when due. *See Youngerman-Reynolds*, 325 U.S. at 424.

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11. As the district court observed, just because 12-hour and 8-hour RNs perform patient care: "it does not follow that the two jobs are 'identical.' When an RN chooses one shift plan over the other, she determines the pattern and scope of her work and time off. Few would argue that there is 'no difference' between a job that allows for two days off versus a job that allows for four days off. *Even if the work is identical, the 'job' itself is not.*" (ER Tab 76 at 30. (emphasis added).)

2. The DOL Expressly Confirmed That The Lower 12-Hour Rate Paid To RNs Is Bona Fide

By definition, where a reduced rate is bona fide, it cannot be the result of an artifice or subterfuge. *See* Merriam-Webster On-Line Dictionary, www.merriam-webster.com ("bona fide" means "made in good faith without fraud or deceit," "neither specious nor counterfeit," "genuine," or "authentic.") A "subterfuge" is the exact opposite, meaning "deception by artifice or stratagem in order to conceal, escape, or evade." *Id.*

The DOL has long employed a three-prong test to determine whether a reduced rate is bona fide. As it reiterated time and again in past opinion letters, a reduced rate is bona fide if: (1) it is agreed to by the employees; (2) it has been in place for a substantial length of time; and (3) it equals or exceeds the minimum wage. As the DOL itself concluded at the court of appeals' invitation, the test is clearly met in this case.[12] First, the rate reduction was agreed to by Parth and other 12-hour shift RNs in individual agreements (and later ratified by Local 121 and its members). Second, lower rates for 12-hour shift RNs have been in place since the late 1980s and have applied to Parth since 1993. Third, and finally, the range of rates paid to 12-hour shift RNs has always exceeded the minimum wage. Accordingly, the court of appeals was correct in holding that there is no evidence of an artifice or subterfuge. The reduced rate was bona fide and not

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12. Indeed, the DOL appended a series of opinions to its amicus brief dating back to 1988 where it approved reducing base rates when employees change from 8-hour shifts to 12-hour shifts. (DOL Brief, pp. 9-12, Exhibits A-C.)

designed to circumvent the overtime requirements of the FLSA. Summary judgment in favor of PVHMC was appropriate, and no grounds for granting the Petition exist.

3. RNs Receive Overtime Payment Pursuant To A Lawful 8/80 Pay Plan And PVHMC Is Not Incentivized To Overwork Its Employees

Parth argues that the cost-neutral pay practices violate the purpose of the FLSA because, in her view, the employer pays no real overtime "penalty" to its 12-hour RNs. (*See* Petition at 22-24.) This argument fails because, as stated by the court of appeals:

> "The parties do not dispute that the wages paid under the pay plan are more than the minimum wages under federal law. The pay practice ensures that employees who work beyond eight hours in a day receive time-and-a-half for their efforts. In fact, the nurses are paid daily overtime under this lawful 8/80 schedule. Such overtime is properly calculated based on the actual overtime rate paid to them. The agreement also prohibits the hospital from requiring its nurses to work additional shifts, absent a medical emergency. Lastly, it ensures that employees who do volunteer receive 'double time' pay. We therefore conclude that the pay practice protects employees from the evils of overwork and underpay, and properly incentivizes PVHMC from overworking its nurses."

Parth, 630 F. 3d at 801. Indeed, the very act of paying daily overtime based on the hours worked and the *actual* bona fide hourly rates paid – rates which in all instances far exceed the minimum wage and to which the parties agreed – negates Parth's argument. The DOL rejected Parth's assertion that the PVHMC Pay Plan made "overtime payments cost neutral." Rather, "[o]vertime pay due...is not neutralized or avoided, but is paid to the nurses when due under the FLSA and is calculated based on the actual hourly rate paid to them." (DOL Brief, p. 6.)

Of significance, this case involves Section 207(j) of the FLSA which provides a limited exception to the standard 40-hour workweek for hospitals. In recognition of their unique scheduling needs, Section 207(j) allows hospitals to agree with their employees to utilize a 14-day work period instead of the typical seven-day workweek requiring overtime for hours worked in excess of 40 per week.[13] Under such "8/80" pay plans, the 40-hour week is disregarded, and overtime instead must be paid at one and one-half times the employee's regular rate for hours worked over eight per day and/or 80 in the 14-day work period.

The Petition cites Section 207(a) cases which refer to the calculation of the regular rate based upon the "standard non-overtime workweek." (*See* Petition 11-14.) But here, because employees work 12-hour shifts under an 8/80 overtime standard, there simply is no "normal" or "standard *non*-overtime workweek." Rather, the standard 12-hour shift that employees work each day involves the

13. Accordingly, the instant matter arises in a limited context which cannot be extrapolated to apply to low-paid workers in cases arising under Section 207(a).

payment of daily overtime for hours worked over eight. Because PVHMC reached an agreement with the RNs to implement an 8/80 pay plan, the relevant inquiry here is under Section 207(j). Thus, so long as PVHMC pays overtime for hours worked in excess of 80 in a 14-day period, there is no violation of the maximum hours limitation set forth in Section 207(j) and therefore no federal question that requires resolution by this Court.[14]

C. The Right To Reduce Rates In Response To The Economic Realties Of The Workplace Was Properly Preserved

Parth's Petition is founded on the flawed notion that once the FLSA took effect, it instantly became illegal for an employer to ever again reduce pay rates. The only other possible reading of Parth's argument, equally absurd, is that it would only be permissible for employers to reduce pay rates of exempt workers or those who never work overtime. On the contrary, it is a natural corollary of a lawful rate reduction that overtime will likewise be paid on the reduced hourly rate, just as PVHMC has done at all times.

Particularly in these challenging economic times, it is undeniable that reductions in salaries and wages must sometimes occur. They may even be necessary to avoid more drastic measures such as layoffs to keep a struggling company afloat. Now, more than ever, it is vital

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14. The Petition puts forth a hypothetical based on 29 C.F.R. § 778.601(d). (*See* Petition at 23.) This hypothetical is inapposite as PVHMC's pay plan fully complies with the requirements of Section 207(j).

to recognize and preserve the freedom and flexibility, including financial flexibility, for employers to establish the terms and conditions of employment with their employees, provided the minimum wage is respected and overtime is paid when required by the FLSA. Because no employer, including non-profit hospitals such as PVHMC, has unlimited funds, every employer must consider budgetary constraints in determining pay rates and scheduling. This is not a novel concept and is essential to every business's survival. Here, the Pay Plan in question was blessed by the Secretary based on the DOL's "long-standing" position under the FLSA. The Pay Plan allows RNs to work the "sought after" 12-hour schedules they prefer and enjoy the time off and lifestyle advantages while earning approximately the same wages they received under the less desirable 8-hour schedules. It also respects the FLSA's minimum wage and overtime requirements by paying time-and-a-half their regular rate after eight hours and double time after 12.

D. Parth's Additional Attempts To Assign Error To The Decision Are Red Herrings

1. The FLSA Allows For A Variety Of Possible Wage Agreements Including PVHMC's Lawful 8/80 Pay Plan

In an attempt to assign error where none exists, Parth contends that the court of appeals "incorrectly believed that a reduction in hourly rates was necessary for PVHMC to accomplish its stated goal of providing 12-hour shifts that were budget-neutral. (*See* Petition at 20. (internal citation omitted).) Obscuring the fact that PVHMC operates under a lawful 8/80 pay plan authorized

by 29 U.S.C. § 207(j), Parth instead points out that the FLSA *permits* 12-hour shifts to be worked under the standard 40-hour workweek contemplated in 29 U.S.C. § 207(a)(1) "and experience no increase in labor costs." (*See* Petition at 21.)

The court of appeals based its holding on no such requirement. Rather, it merely recognized the parties' agreement to a lawful 8/80 pay plan permitted under Section 207(j). Accordingly, the only relevant inquiry is whether overtime was properly paid under Section 207(j); the standard 40-hour week under Section 207(a) simply does not apply. The court of appeals had no duty or reason to explore other hypothetical wage arrangements the FLSA may allow.

2. Contrary To Parth's Claims, The Decision Does Not Allow Waiver Of FLSA Rights Through Collective Bargaining

The court of appeals' decision is grounded in good policy, common sense, and the practical realities of the workplace. It highlights the RNs' desire for the 12-hour shift schedule and their agreement to the lower base rates plus overtime. This schedule allows them to earn roughly the same six-figure incomes they had previously earned while working two fewer days per week.[15] Contrary to

15. The one-time reduction in base rates occurred more than 15 years before the lawsuit was filed and Parth voluntarily agreed to work 12-hour shifts at a lower rate in 1993. Employees hired to work 12-hour shifts thereafter were simply hired at the 12-hour pay scale that established lower hourly base rates than the less desirable 8-hour pay scale that applied to positions that were harder to fill.

Parth's assertion, the court of appeals did not hold that individuals may waive their FLSA rights by agreement. (*See* Petition at 16-19.) Quite pointedly, the court of appeals stated, "an employee may not waive his or her rights under the FLSA." *See Parth*, 630 F.3d at 802, fn. 2. (internal citations omitted). The court of appeals held that PVHMC's 12-hour shift program complies with the FLSA. It is beyond dispute that PVHMC pays overtime to RNs assigned to 12-hour job classifications at one and one-half times their regular rate as required by the FLSA and the CBA. Thus, the "waiver" of overtime was not at issue.

CONCLUSION

PVHMC's Pay Plan responded to employees' requests for a flexible work schedule that provided them the schedule and wages they desired. Consistent with decades of authorities, including DOL opinions, the lower rates paid to 12-hour RNs were bona fide rates that at all times exceeded the minimum wage. In addition, employees in 12-hour jobs were paid overtime at time-and-a-half their regular rate of pay for hours over eight in a day and double pay for hours over 12.

As the DOL plainly noted in its amicus brief, there is no conflict among the circuits or other justification for review. For the reasons set forth herein, PVHMC respectfully requests that Parth's Petition be denied.

Respectfully submitted,

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